87-468

No. .....

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

—o—

DONALD E. AUSTIN

Petitioner,

v.

BVA CREDIT CORPORATION,
a/k/a BANK OF VIRGINIA

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTIONS TO BE PRESENTED FOR REVIEW

1. Whether a Court of Appeals may affirm without opinion the imposition of a blanket ten percent (10%) in attorneys' fees amounting to more than $400,000.00 based on Georgia law without any evidence when it is uncontroverted that the contract between the parties is governed by Virginia law which imposes a duty on the party seeking attorneys' fees to prove the reasonableness of those fees?

2. Whether a Court of Appeals may refuse to remand an action to a district court for consideration of equitable remedies based on the Petitioner's alleged failure to restore the status quo when it is apparent that it was the Respondent's own conduct that prevented Petitioner from restoring the status quo?

3. Whether the Court of Appeals' affirmance of the trial court's order granting partial summary judgment may be sustained given the myriad issues of material fact present in the record?

4. Whether the Court of Appeals' affirmance of the judgment entered by the trial court on the issues that were allowed to go to the jury may be sustained when it is clear that the charges given by the trial court relating both to issues of liability and damages raise a substantial doubt as to whether the jury was properly guided in its deliberations?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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OPINIONS

The District Court entered its Order granting in part and denying in part Respondent's Motion for Summary Judgment on July 2, 1986. Judgment was entered on that Order on July 3, 1986. Petitioner's Motion for Reconsideration of the Court's Order of July 2, 1986 and Judgment of July 3, 1986 was denied by Order of the Court dated July 24, 1986. Following the entry of these Orders, a jury trial commenced as to the remaining allegations left open by the District Court's Orders of July 2, 1986 and July 24, 1986 and Judgment was entered on the jury verdict in favor of Respondent and against Petitioner on July 29, 1986. An amended Judgment was entered on August 7, 1986. Copies of the District Court's Orders of July 2, 1986 and July 24, 1986 are contained in the Appendix, along with copies of the District Court's Judgments dated July 3, 1986, July 29, 1986 and August 7, 1986.

The Opinion and Judgments of the Court of Appeals for the Eleventh Circuit were not reported and are also contained in the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered originally on May 4, 1987. The Petitioner's Petition For Rehearing And Suggestion For Rehearing En Banc was denied on June 22, 1987. Copies of these Orders are attached hereto and

made a part hereof as part of the Appendix. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Sec. 2101(c).

STATUTES AND RULES INVOLVED

This case raises an issue under Rule 56(c) of the Federal Rules of Civil Procedure which provides:

> (c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

This case also raises an issue under Rule 36-1 (formerly Rule 25) of the Rules of the United States Court of Appeals for the Eleventh Circuit which provides:

> 11th Cir.R. 36-1 *Affirmance Without Opinion.*
>
> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

———o———

STATEMENT OF THE CASE

Petitioner Donald E. Austin (hereinafter referred to as Austin) filed his complaint seeking damages against the Respondent BVA Credit Organization a/k/a Bank of Virginia (hereinafter referred to as BVA) on October 1, 1985. (R-1-1) Count One of Austin's Complaint alleged a breach of contract with BVA upon which Austin relied to his detriment, the said breach having occurred when BVA failed to furnish certain sums of money which it had agreed to lend to Austin and demanded security in excess of originally agreed upon security. Austin alleged that as a result of BVA's breach of its promise to lend the full amount it had promised at agreed upon levels of collateral, and by further breach of its promise to furnish sufficient operating capital to a company being operated by Austin, Diamond Manufacturing Company, that said Diamond Manufacturing Company had experienced continuous increasing business losses which had compelled said Diamond Manufacturing Company to file for relief under Chapter 11 of the Bankruptcy Code. As sole remaining stock holder of Diamond Manufacturing Company Austin further alleged that his

stockholdings in said company had been diminished in value by virtue of BVA's breach of contract in an amount not less than $25,000,000.00. In addition, Austin asserted that all of his personal assets had been placed in jeopardy given his status as a guarantor and the damage to the financial condition of Diamond Manufacturing Company and Rose Marine, another company controlled by Austin, all of which was caused by BVA. (R1-1-4-5)

In Count Two of his Complaint, Austin alleged that the actions of BVA constituted a fraud and deceit in that BVA well knew prior to breaching its contract with Austin that it had no intention of honoring its promises to Austin. In addition, Austin alleged that BVA's failure to disclose the involvement of Austin's sister, Mrs. Delores A. Diamond, in its scheme, worked a fraud upon Austin. Austin alleged that the fraudulent conduct of the BVA had damaged him as the sole remaining stock holder and guarantor of Diamond Manufacturing Company in an amount not less than $25,000,000.00. In addition, Austin asserted that all of his personal assets had been placed in jeopardy given his status as a guarantor and the damage to the financial condition of Diamond Manufacturing Company and Rose Marine caused by BVA. (R1-1-5-6)

The remaining two counts of Austin's original Complaint allege violations of both the Federal and Georgia Racketeer Influenced and Corrupt Organizations Acts. (R1-1-6-7)

BVA responded with an answer to Counts One and Two of the Complaint (R1-2) and with a Motion to Dismiss Counts Three and Four of the Complaint on October 22, 1985. (R1-4) BVA also counter-claimed seeking to recover

payments under its alleged contracts with Austin. (R1-5) On November 27, 1985 the trial court granted the BVA's Motion to Dismiss Counts Three and Four of the Austin's Complaint without prejudice with the right to refile those counts should discovery reveal specific facts to support those counts. (R2-10)

Subsequently on March 6, 1986 BVA filed a Motion for Summary Judgment as the remaining counts of Austin's Complaint. (R3-30)

On July 2, 1986 the Court entered an Order granting in part and denying in part the BVA's Motion for Summary Judgment as to the remaining counts of Austin's Complaint denying summary judgment as to Austin's allegations that BVA has charged inappropriate interest but granting BVA's motion as to the remaining allegations set forth in Austin's Complaint. (R6-61) The trial court directed the clerk to enter a judgment in favor of BVA and against Austin in the amount of $4,000,000.00, plus interest and 10% attorneys' fees and that judgment was entered on July 3, 1986. (R6-62) This award of attorneys' fees was premised expressly on Georgia law. On July 14, 1986, Austin filed a Motion for Reconsideration of the Court's Order of July 2, 1986 and the judgment entered on July 3, 1986. That Motion for Reconsideration was denied by Order dated July 24, 1986. (R6-65)

On July 28, 1986 jury trial commenced as to the remaining interest allegations left open by the Court's Order of July 2, 1986 and on July 29, 1986 a jury verdict was returned in favor of BVA. Judgment was entered in favor of BVA Credit Corporation and against Plaintiff Donald E. Austin on July 29, 1986 (R6-70) and an amended judg-

ment was entered on August 7, 1986. (R6-71) Again, these judgments included an award of attorneys' fees pursuant to Georgia law. A timely Notice of Appeal was then filed on behalf of Plaintiff/Appellant Donald E. Austin challenging the District Court's July 2, 1986 Order and July 3, 1986 judgment granting in part BVA's Motion for Summary Judgment, the District Court's July 24, 1986 Order denying Austin's Motion for Reconsideration, the judgment entered on the jury verdict on July 29, 1986, and the amended judgment entered on August 7, 1986. (R6-72) The trial court's orders and judgments subsequently were affirmed without opinion.

A brief review of the complex facts underlying this action reveals immediately the grave impropriety of the trial court's rulings and the Court of Appeals summary affirmance of those rulings.

In order to provide operating capital for Diamond Manufacturing Company, Austin secured a $1,500,000 line of credit from BVA on March 14, 1978 which was increased to $2,250,000 on July 19, 1978 and which was subsequently amended as part of a closing held on May 12, 1983. Austin was named as guarantor under this line of credit.

The loan agreement for the line of credit provided that BVA would charge Diamond Manufacturing Company interest equal to 3¾ percent over "the best rate charged by Bank of Virginia from time to time to its largest and most credit worthy customers for new unsecured 90 day loans." (R1-5-Exhibit "A", Section 2.3)

The deposition of Roy Brown, the head of BVA's Commercial Lending Department at the time the relevant let-

ter of credit was extended, which was introduced into evidence at trial and which was before the trial court when it entered its order granting partial summary judgment to the Respondent, clearly established that the interest rate charged to Diamond Manufacturing Company and guaranteed by Austin was not calculated under the formula set forth in the loan agreements but rather was set simply in accordance with certain prime rates established by banks in New York and Chicago. (R9-76-100) Again, Mr. Brown's deposition was presented in its entirety to the Court by Austin in response to BVA's Motion for Summary Judgment. (R4-48-Exhibit "A")

Mr. Brown's testimony clearly established that there was a distinction between the prime rate charged by the Bank of Virginia and a "best rate". (R9-76-96-97) Mr. Brown noted that large commercial customers might be charged less than prime and that would constitute the "best rate" (R9-76-107) charged by the Bank of Virginia to its customers. Mr. Brown further testified that he considered loans given by BVA Credit Corporation through commercial loan officers in the commercial section of the Bank of Virginia to be commercial loans regardless of whether those loans were processed on consumer loan forms in individual names. (R9-76-120; R4-48-Exhibit "A", pp. 37-39, 62.) (Roy Brown deposition, pp. 37-39, 62.) At trial Austin introduced notes that when compared to the schedule of prime rates produced by BVA, all appeared to have been made at below the listed prime rate. The relevant notes were notes that were produced from the Richmond Division Commercial Loan files of the Bank of Virginia. (R9-76-56-67)

Prior to this litigation, Austin had inquired of BVA Credit Corporation or the Bank by the Bank of Virginia on several occasions as to the method that BVA was utilizing in calculating interest on loans to Diamond Manufacturing Company that were guaranteed by him personally. Despite these inquiries, Austin was never provided with an explanation.

It appears that on or about March 10, 1981, BVA undertook to change its definition of "best rate" to a system of tying interest rates to an announced prime rate. Rather than admit that interest up until that time had been calculated under a nonexistent standard, the Defendant Bank of Virginia through a letter dated March 9, 1981 and enclosure sought to minimize the importance of the change in definitions so as to mislead customers such as Austin. (R9-76-159)

Roy Brown made it clear that this change in the method of calculating the interest rate was brought about by the Bank's knowledge of the decision in *Kleiner v. First National Bank of Atlanta,* 97 F.R.D. 683 (N.D. Ga. 1983) in which the First National Bank of Atlanta was sued for practices similar to those engaged in by BVA. (R9-76-128-29)

Roy Brown also testified that neither BVA nor the Bank of Virginia ever attempted to calculate "the best rate" charged by the Bank of Virginia from time to time to its largest and most credit worthy customers for new unsecured 90 day loans. Information on new 90 day notes was never compiled by the Bank of Virginia. (R9-76-113, 117) The definition, therefore, set forth in the loan docu-

ments entered into by Diamond Manufacturing Company and Donald E. Austin in 1978 was meaningless.

Austin further asserted in response to BVA's Motion for Summary Judgment that BVA's failure ever to inform him that it never used, or never had any intention of using the definition of "best rate" set forth in the original loan documents executed in 1978 amounted to gross fraud which was only discovered after diligent inquiry on the last day of discovery in this case during the deposition of Roy Brown. (R4-48) On discovery, Defendant BVA consistently represented to the Austin that the term "best rate" was synonymous with the Bank's prime rate of interest. In this regard, a list of prime rates was provided Austin in response to Austin's discovery requests. In its General Objections to Interrogatories Propounded by Austin, BVA reiterated the definition of "best rate" as being "the interest rate charged from time to time by Bank of Virginia to its largest and most credit worthy commercial customers for new, unsecured 90 day loans." In response to interrogatory number 8 propounded by Austin, BVA represented that the list of prime interest rates attached thereto and made a part thereof as Exhibit "A" was a list of "best rates" charged to commercial customers during the time period relevant to this litigation. In response to interrogatory number 9 propounded by Austin, BVA further represented that the list of prime rates produced amounted to a list of the lowest rates of interest actually charged by BVA or the Bank of Virginia to commercial customers for new 90 day notes for all points in time from January 1, 1978 to the present. (R4-48-Exhibit "C") Since Austin only acquired evidence of BVA's fraud at the close of discovery and in fact had continuously been misled by BVA

in this litigation as to its policies regarding interest rates, there was not ratification, waiver or estoppel relating to the BVA's fraud.

Not only would Austin not have entered into the initial line of credit arrangement with the defendant on March 14, 1978 if he had known the Bank's fraud concerning the definition of "best rate", it is further clear from the affidavit of Donald E. Austin given in response to BVA's Motion for Summary Judgment and Austin's testimony at trial that he would not have continued his relationship with BVA through the closing held on May 12, 1983, if he had known of BVA's fraud. (R4-48-Exhibit "E"; R9-76-155)

The facts before the district court, when taken in the light most favorable to Austin, clearly established that the Bank never utilized the definition of "best rate" set forth in the original March 14, 1978 loan agreement. The trial court, therefore, appropriately allowed this contention to be tried. The facts before the district court further showed, however, that Austin did not discover the fact that he had been charged a nonexistent rate of interest until the deposition of Roy Brown taken during this litigation on Monday, March 24, 1986. In opposition to BVA's motion for summary judgment, Donald Austin further made it clear through affidavit that he would not have continued his relationship with BVA through the subsequent closing held on May 12, 1983 if he had known of BVA's fraud. Thus there were facts before the court to suggest that Austin would have severed his relationship with BVA prior to the time in 1983 when BVA sought to lend additional money to Austin, Diamond Manufacturing Company and Rose

Marine, Inc. and to secure additional collateral. The trial court only let the first step of BVA's misconduct to go to the jury and this was error. Under Rule 56 of the Federal Rules of Civil Procedure, myriad genuine issues of material fact existed which precluded the trial court from entering any judgment on behalf of the Respondent without a trial.

In this regard, it further must be emphasized that the record before the district court contained evidence that Austin did not know at the closing on May 12, 1983 that Mrs. Diamond had informed BVA through her attorney Kran Riddle that she planned to initiate a ten million dollar lawsuit against Austin despite having executed releases to Austin. Thus, in offering Austin a reduced loan on May 12, 1983, the Bank knew that Austin would be faced with additional expenses of litigation and potential liability. These facts, which materially altered Austin's risk under the loans, nevertheless, were not conveyed to Austin. This fraud was not discovered by Austin until the deposition of Kran Riddle taken after BVA's motion for summary judgment was filed in this litigation. This omission was contrary to legal and equitable duty and the trust justly reposed by Austin in BVA. Put simply, BVA's actions amounted to gross fraud. Thus, there were facts before the district court to indicate that BVA's entire offer to assist Austin in buying out the interest of Delores Diamond in Diamond Mamufacturing Company was a scheme to force Austin to accept a loan which was marginally sufficient to allow him to operate Diamond Manufacturing Company with the intent to ask for increased collateral so that the Bank could foreclose on that collateral. This issue should not have been decided on summary judgment.

Again, genuine issues of material fact preventing the entry of judgment in favor of the respondent were present in the record and the granting of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure has created a gross injustice in this case.

In granting partial summary judgment to BVA, the trial court awarded attorneys' fees to BVA allegedly incurred and seeking enforcement of its notes. The final judgments entered by the trial court following trial likewise awarded attorneys' fees. Each of the notes at issue in this litigation states that it is to be "governed by and interpreted in accordance with the laws of the Commonwealth of Virginia." Each note further states that "the borrower hereby agrees to pay all costs and expense, including reasonable attorneys' fees of collection incurred by the holder hereof." (R-3-30-tab 16-17) Despite the fact that it is absolutely uncontroverted that the Notes were to be governed by Virginia law, the trial court proceeded to apply Georgia law in awarding attorneys' fees. This express application of Georgia law was affirmed without opinion by the Court of Appeals.

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BASIS FOR FEDERAL JURISDICTION BELOW

The District Court for the Southern District of Georgia, Savannah Division, had jurisdiction over this case pursuant to 28 U.S.C. Sec. 1332.

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ARGUMENT

A. A Court of Appeals May Not Affirm Without Opinion The Imposition of a Blanket Ten Percent (10%) in Attorneys' Fees Amounting to More Than $400,000.00 Based on Georgia Law Without Any Evidence When It Is Uncontroverted That the Contract Between the Parties Is Governed by Virginia Law Which Imposes a Duty on the Party Seeking Attorneys' Fees to Prove the Reasonableness of Those Fees.

It is absolutely clear under Virginia law that where a note containing a provision for attorneys' fees does not specify the amount of such fees in terms of either a fixed sum or a certain percentage of the balance due on the note, but provides merely for the payment of reasonable attorneys' fees, the plaintiff, in order to recover for such fees, must introduce evidence from which the reasonableness of the fee may be determined. *Atkinson v. Neblett*, 144 Va. 220, 132 S.E. 326 (1926); *Attorneys Fees—Reasonableness*, 18 A.L.R. 3rd 733, 736. In this case, the trial court, expressly relying upon Georgia law, imposed a ten percent blanket attorneys' fee in its order granting partial summary judgment to Respondent entered on July 2, 1986. BVA presented absolutely no evidence to the trial court from which the reasonableness of its fees could be determined. Under the uncontroverted facts, it was clear error for the trial court to impose an attorneys' fee exceeding $400,000.00 without having before it any evidence relating to the reasonableness of that fee and for the Court of Appeals to affirm that judgment without opinion.

The burden of proof on the issue of attorneys' fees was at all times on BVA and Petitioner was not obligated

to come forward with any evidence whatsoever concerning the attorneys' fees issue in light of BVA's failure even to attempt to meet its burden of proof on summary judgment. *See* 6 *Moore's Federal Practice,* Sec. 56.15 [3] (1986) Again, it must be emphasized that the attorneys' fees issue was decided in the context of BVA's motion for summary judgment and was not an issue dealt with at trial. Thus, Petitioner had no obligation to present evidence concerning the attorneys' fees issue in the context of the Respondent's motion for summary judgment and had no opportunity to present such evidence after the trial court entered its judgment on July 3, 1986. Moreover, Petitioner was under no obligation to move for reconsideration of this issue before the trial court as a prerequisite to an appeal. *See* 5A *Moore's Federal Practice,* Sec. 52.10, 52.11 [4] (1986); 6A *Moore's Federal Practice,* Sec. 59.14, p. 59-306 (1986).

Despite this clear error in applying Georgia law rather than Virginia law, the United States Court of Appeals for the Eleventh Circuit rendered an affirmance without opinion under Rule 36-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit (formerly Rule 25). Such a summary affirmance was absolutely inappropriate under the Court's rules and no reason has been given for the Court of Appeals failure to correct a clear error of law. Moreover, by failing to address directly this legal issue, the Court of Appeals has prejudiced the Petitioner since the district court subsequently has denied Petitioner's motion for reconsideration of this calculation of attorneys' fees based on the mandate rendered by the Court of Appeals. In this regard, a copy of the district court's Order dated August 21, 1987 is contained in the Appendix. Thus, unless relief is granted from the judgment rendered by

the Court of Appeals, a clear legal error will be allowed to stand and the Petitioner will be grossly prejudiced.

B. A Court of Appeals May Not Refuse to Remand an Action to a District Court for Consideration of Equitable Remedies Based on the Petitioner's Alleged Failure to Restore the Status Quo When It Is Apparent That It Was the Respondent's Own Conduct That Prevented Petitioner From Restoring the Status Quo.

BVA's argument that Austin is not entitled to equitable relief because he has been unable to restore BVA to status quo ignores the fact that Austin himself could not be returned to his original position after he entered into the agreement with Delores Diamond under which he released his claim to substantial assets held by Delores Diamond. Austin did not keep the funds loaned by BVA; those funds went to Delores Diamond and to the operation of Diamond Manufacturing. In granting in part the Respondent's motion for summary judgment, the district court concluded that it could not consider equitable remedies raised by the Petitioner in light of Petitioner's inability to restore the status quo. The United States Court of Appeals for the Eleventh Circuit, contrary to its own rules, affirmed this erroneous legal conclusion without opinion.

While as a general rule a defrauded party must restore the status quo in order to rescind a contract, *see Puckett v. Reese,* 203 Ga. 716 (1948), there as exceptions to this rule when the defrauded party has been placed in a position where he is unable fully to restore the status quo. *See McClintock on Equity*, Sec. 86, pp. 231-33 (2d Ed.

1948). In this case, Austin was placed in a position by the BVA's continuing fraud whereby he was unable to repay all of the money loaned by BVA in a lump sum. The trial court, however, had equity power to frame a proper remedy. One possible remedy, might have been to waive all interest on the loans and to allow Austin to repay principle through a reasonable liquidation of assets. *See Greene v. Gibralter Mortgage Investment Corporation,* 488 F. Supp. 177 (D.D.C. 1980); *In re Consolidated Pretrial Proceedings in Airwest Securities Litigation,* 436 F. Supp. 1281 (N.D. Cal. 1977). The trial court, however, did not ever consider the possibility of such a remedy and simply proceeded to grant summary judgment against the bulk of Austin's allegations. Under the record before the trial court, this judgment was clear error. The facts set forth by Austin in opposition to BVA's motion for summary judgment were sufficient to pierce the technical arguments raised by BVA and entitle him to his day in court. This case should have been remanded by the Court of Appeals to the trial court for consideration of the equitable arguments made by Petitioner in opposition to Respondent's motion for summary judgment.

C. The Court of Appeals May Not Affirm the Trial Court's Order Granting Partial Summary Judgment Given The Myriad Issues of Material Fact Present in the Record.

Despite presenting voluminous facts to the district court to support his theory of a scheme on the part of BVA as an asset based lender to deprive him of his assets, Austin was never given the opportunity to present his contentions to a jury.

At the outset of his relationship with BVA, BVA induced Austin to do business with it through promises that he would be given a rate of interest based upon the Bank's absolute *best* rate. Evidence presented in this case showed that BVA never compiled information concerning the "best rate" charged on new unsecured 90 day notes to its largest and most credit worthy customers. Thus the definition of "best rate" which induced Austin to do business with BVA, was a false rate that was never utilized by BVA. Since the Bank never kept any record of new unsecured 90 day notes made to its largest and most credit worthy customers and, further, never established any uniform definition of "large customer", Austin was faced in this litigation with the almost impossible task of proving what the "best rate" might have been. This task was reinforced by the trial court's jury charge. Since Austin was placed in this untenable position by BVA's own conduct, equitable relief as sought by Austin was appropriate. Such relief was rejected summarily by the trial court.

Likewise, in regard to the broader scheme which the trial court took from the jury, Austin never knew until this litigation why he was unable to fulfill his commitments to BVA. Through discovery in this case, the picture became clear. The Bank knew at the time that it entered into the closing on May 12, 1983 that Mrs. Diamond planned to file a ten million eight hundred thousand dollar lawsuit against Austin. (R. 6-65-12) [see Appendix tab number 18]) The deposition testimony of Hugh Cheshier taken in this case revealed that Bank loan officers admitted to Mr. Cheshier after the closing that Mrs. Diamond insisted that the Bank tie up all of Austin's assets. (R. 6-65-11-12 [see Appendix tab number 19 and 20]) These facts when

taken in conjunction with BVA's continuing demands for increased collateral and refusal to allow Austin to use excess equity to secure bonding illustrates BVA's scheme. (R. 6-65-12 [see Appendix, tab number 17 and 21]) BVA now argues that since it was successful in keeping Austin on the hook through a number of loan renewals while demanding increased collateral that it is absolved from liability. To the contrary, the fraud utilized by BVA in inducing Austin to commit himself to a buy-out of Delores Diamond infected every subsequent agreement entered into between Austin and BVA. Summary judgment is not to be used as a substitute for trial. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is inappropriate if genuine issues of material fact are present. Even the most cursory review of the record in this case reveals numerous issues of material fact. Petitioner was entitled to present his theories to a jury and the summary affirmance of the trial court's orders and judgments rendered by the Court of Appeals should not be allowed to stand.

D. The Court of Appeals May Not Affirm the Judgment Entered by the Trial Court on the Issues that Were Allowed to go to the Jury When it is clear That the Charges Given by the Trial Court Relating Both to Issues of Liability and Damages Raise a Substantial Doubt as to Whether the Jury Was Properly Guided in its Deliberations.

Contrary to BVA's arguments, it is clear from a review of the trial court's jury charge, that the trial court's charge was internally inconsistent and inherently misleading. Rather than making necessary legal rulings, the trial

court simply chose to present conflicting legal theories to the jury without proper guidance. The charges in question relate both to liability and damages since those issues were inextricably interwined. It is a jury's responsibility to determine the facts, not the law. The trial court's failure to make an appropriate legal determination as to the propriety of the legal theories being proffered by the parties or to make a clear distinction between those theories was clear error. *See National Independent Theatre Exhibitors, Inc. v. Charter Financial Group, Inc.*, 747 F. 2d 1396 (11th Cir. 1984), *cert. denied*, 471 U.S. 1056 (1985).

—o—

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that his Petition For Writ of Certiorari be granted and that this case be remanded to the trial court for a jury trial as to the issues eliminated by the district court in its order granting in part Respondent's motion for summary judgment. Petitioner further requests that he be granted a new trial as to the issues actually presented to the jury in light of the district court's erroneous jury charge. In the alternative, Petitioner requests that this case be remanded for proper consideration of available equitable remedies. Petitioner Donald E. Austin further respectfully requests that, at the very least, the judgments entered by the district court be amended as to the attorneys' fees granted to Respondent and that the Respondent be placed to its proof on the issue of reasonable attorneys' fees. Finally, if relief is to be denied, Petitioner shows that he is entitled to a written order stating the reasons

for denial of relief as opposed to an affirmance without opinion.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DONALD E. AUSTIN,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
v.	)	NO. 485-373
	)	
BVA CREDIT CORPORATION, a/k/a Bank of Virginia,	)	(Filed July 2, 1986)
	)	
	)	
Defendant.	)	

ORDER

This is a contract action in which Donald Austin ("Austin") claims that BVA Credit Corporation ("BVA") induced him to enter into loan agreements through fraud and duress and that BVA breached an oral contract regarding such loans. Plaintiff also asserts that BVA overcharged him interest by using a "prime rate" formula to which Austin did not consent. BVA has counterclaimed for the amounts due under the loan agreements, plus accrued interest, attorney fees and collection costs. Before the Court is defendant's motion for summary judgment on Austin's claims, as well as on its own counterclaim. Having carefully considered the voluminous record in the case, this Court has concluded that the motion must be granted in part and denied in part.

THE FACTS

History of the Austin Companies

This litigation indirectly arose out of a bitter will contest instituted in the early 1970s by Delores Diamond

("Delores"), widow of construction magnate Barney Diamond. Upon his death, Barney Diamond left his second wife only a pittance of his multimillion dollar estate. Austin, a practicing attorney and Delores' brother, was enraged at the "shoddy" treatment his sister had received. He vowed to help Delores break the will for 40% of whatever she received.

Following state court trials, Delores eventually prevailed on her claim that Barney Diamond had promised to give her one-third of his estate if she cared for him the rest of his life. In addition to the cash, land, heavy equipment and corporate assets, Delores received 100% of Diamond Manufacturing Company ("Diamond"). The litigation had been costly, however, in both dollars and ill-will. Austin had devoted considerable time, expertise and money to the case, yet had not been paid for his efforts. His sister seemed unwilling to pay his 40% cut, perhaps because a bevy of lawyers had billed out more than $1 million in legal fees.

Delores temporarily placated Austin by promising him 40% of the Diamond stock. Untutored in the intricacies of marine construction, she also asked him to close his law office and help her run the enterprise. Austin agreed, albeit reluctantly, since he himself had no experience in managing a business. During that time, Austin also helped form and retained an interest in Rose Marine, Inc., another marine construction company.

The 1978 Loan Agreement

To operate Diamond, Austin and Delores secured a $1.5 million loan from BVA on March 14, 1978. Brother and sister personally guaranteed repayment of the indebtedness. On July 19, 1979, BVA increased Diamond's line of

credit to $2.25 million. Both the 1978 and 1979 loan agreements called for interest to be calculated "at a rate per annum equal to 3¾% over the best rate charged from time to time by Bank of Virginia . . . to its largest and most creditworthy customers for new, unsecured 90-day loans."

Despite the availability of ample financial resources, all was not well between Austin and Delores. Ugly disputes erupted over the proper management of Diamond. Their animosity spilled over into day-to-day operations, causing valued employees to seek work elsewhere. Eventually, their relationship soured to where it threatened Diamond's very viability. It was at this point, Austin claims, that BVA suggested he buy out his sister and offered him sufficient funds to do so and still have operating capital.

The 1983 Loan Agreements

Thinking he had a firm commitment from BVA to loan him "not less than $4.25 million," Austin began discussing a buy-out with Delores. Rocky negotiations eventually produced an acceptable buy-sell agreement. Before their agreement was implemented, however, Austin learned that BVA did not intend to loan him the full amount he originally requested and also wanted him to put up additional collateral. Delores threatened to sue Austin if he did not consummate their contract.

Although he knew BVA would not loan him enough money to pay Delores, retire certain debts and still have working capital, Austin went ahead with the loan closing on May 12, 1983. At that time, Austin personally borrowed $1 million and executed a promissory note in favor of BVA in that amount. BVA also agreed to lend $550,000 to Rose

Marine and $2.45 million to Diamond. The 1978 loan agreement was also amended to reflect the reduced amount of Diamond's indebtedness. As simple addition reveals, the loan package totaled $4 million.

Austin found himself in financial hot water almost immediately. Hamstrung by a lack of operating capital and a resulting inability to get bonding for big jobs, he soon fell behind on his interest payments. BVA granted Austin extension after extension to give him time to sell assets and place Diamond in a profit-making position. The three notes were renewed 13 times between May 1983 and April 1985. Despite these efforts, the loans went into default.

The Courthouse Steps

In July 1985, BVA formally notified Austin that foreclosure was imminent. Lawyers were retained to initiate proceedings to collect all sums due under the 1983 loan agreements. Diamond and Rose Marine filed bankruptcy petitions shortly thereafter. Austin then brought this diversity action, alleging fraud, duress and breach of an oral contract in relation to the 1983 loans. He also alleged that BVA overcharged him interest on the 1978 loan to Diamond by computing interest by a formula different from the one set out in the contract. BVA counterclaimed for the amounts it is owed under the 1983 agreements.

DISCUSSION

The Prime Rate Claim

The essence of Austin's prime rate claim is that BVA agreed to calculate interest on the Diamond loan by one formula in the 1978 agreement, yet actually used another, less favorable, formula. As a result, Austin alleges that he

is entitled to recover the amounts he was overcharged, if any. *Compare Kleiner v. First National Bank of Atlanta*, 97 F.R.D. 683 (N.D.Ga. 1983) (prime rate claim).

Under the terms of the 1978 Loan and Security Agreement, BVA agreed to charge Diamond interest "at a rate per annum equal to 3¾% over the *best rate* charged from time to time by Bank of Virginia . . . to its largest and most creditworthy commercial customers for new, unsecured 90-day loans." (Emphasis added.) Perhaps in response to the *Kleiner* litigation, in 1981 the agreement was amended to reflect that Diamond would be charged interest "at a rate per annum equal to 3¾% over the announced *prime interest rate* charged from time to time by Bank of Virginia." (Emphasis added.) Austin charges that, unknown to him, BVA never in fact calculated interest according to the "best rate" formula specified in the original contract, but always treated the term as being synonymous with the "prime rate."

While defendant argues that all parties involved understood "best rate" and "prime rate" to mean the same thing, Austin strenuously resists this interpretation of the 1978 agreement. Despite repeated inquiries, plaintiff asserts that he was never able to obtain a satisfactory explanation of how interest was computed on the Diamond loan. Moreover, Roy Brown, a retired senior official in the commercial lending division of Bank of Virginia, testified that the "best rate" could at times refer to an interest rate lower than the published "prime rate." Brown Dep. at 10, 21. Brown conceded that "it is simply not possible, as a practical matter," for a lender to compute interest rates by actually examining the individual rates charged on other loans. *Id.* at 33. In effect, Brown has admitted that the

1978 "best rate" formula could not be implemented as defined in the contract.

Given this contradictory understanding of what "best rate" meant, summary judgment is inappropriate on the issue of interest overcharges. The prime rate claim presents unresolved questions of material fact which are best left to a jury.

Promissory Fraud/Breach of Oral Contract

Having inexorably slid down the slope of default, Austin now seeks relief from his financial obligations on the grounds that BVA breached an oral contract and induced him to sign the 1983 loan papers by fraudulently misrepresenting the amount of money it would advance and the level of security it would require.

Unfortunately for Austin, his purported oral contract to borrow "not less than $4.25 million" is void for vagueness. Under Georgia law, an agreement to lend money is only enforceable if a loan amount, an interest rate and a maturity date are specified. *Dolanson Co. v. Citizens & Southern National Bank,* 242 Ga. 681, 682, 251 S.E.2d 274 (1978); *Beasley v. Ponder,* 143 Ga. App. 810, 240 S.E.2d 274 (1977); *Bonner v. Wachovia Mortgage Co.,* 142 Ga. App. 748, 750, 236 S.E.2d 877 (1977).

Austin has admitted on deposition that BVA never committed to lend him a specific sum of money to accomplish the buy-out and restore Diamond to fiscal health. Austin Dep., Vol. II, at 114-15. At most, it seems that both parties understood plaintiff needed upwards of $4.6 million to fulfill his objectives. *Id.* at 93-94. Nor is there any evidence that Austin and BVA had a firm verbal agreement

as to the interest rate or duration of the loan. In short, Austin's oral contract is unenforceable as a matter of law.

Even were there a cognizable oral promise, it would nonetheless be unenforceable under the parol evidence rule and the merger doctrine. Generally, "all prior and contemporaneous oral agreements between contracting parties are merged into the written contract which purports to be the entire agreement of the parties." *Adams v. North American Brokers, Inc.*, 168 Ga. App. 341, 343, 309 S.E.2d 164 (1983). Under O.C.G.A. § 13-2-2(1) (Michie 1982), parol evidence is inadmissible to vary the terms of an unambiguous written contract. *See also S & S Builders, Inc. v. Equitable Investment Corp.*, 219 Ga. 557, 561, 134 S.E.2d 777 (1964); *Taylor Freezer Sales Co. v. Hydrick*, 138 Ga. App. 738, 741, 227 S.E.2d 494 (1976).

In addition to the common law rules of contract construction, merger and integrations clauses in Austin's 1983 loan documents expressly provided that "this Agreement contains the entire agreement between the parties." Upon careful reading, it is clear that the 1983 agreements are not ambiguous. Accordingly, when BVA's verbal promises, if any, merged into the written documents, Austin's cause of action for breach of an oral contract was irrevocably destroyed.

The promissory fraud claim must fail for the same reasons. First, a cause of action for fraud cannot be predicated on a promise which is unenforceable at the time it was made. *Clare Development Corp. v. First National Bank of Columbus*, 243 Ga. 709, 256 S.E.2d 452 (1979); *Sierra Associates v. Continental Illinois National Bank & Trust Co.*, 196 Ga. App. 784, 792, 314 S.E.2d 250 (1984). Since an oral

promise to make a loan without any specification of principal, interest and duration is unenforceable, it cannot support an action for promissory fraud. *Beasley v. Ponder, supra,* at 810, 240 S.E.2d 111; *Bonner v. Wachovia Mortgage Co., supra,* at 750, 236 S.E.2d 877.

Austin's promissory fraud claim is likewise barred by the parol evidence rule and the merger doctrine. *See, e.g., Reuben v. First National Bank of Atlanta,* 146 Ga. App. 864, 247 S.E.2d 504 (1978). In *Reuben,* a case factually quite similar to this one, a contractor claimed that the bank verbally promised to finance 100% of the real estate acquisition costs. In the written loan documents, however, First Atlanta agreed to furnish only 80% of the acquisition money. Reuben accepted the lesser amount, but was forced to spend so much of his own cash to purchase land that he could not make his loan payments. He went into default and sued the bank, alleging promissory fraud. The court granted the bank summary judgment, reasoning that Reuben could not establish fraud with respect to the promise to lend 100% of the acquisition costs because he later signed a written contract with different terms concerning the same matter. That contract governed the parties' rights.

The promissory fraud alleged by Austin is indistinguishable from that claimed in *Reuben.* Like cases deserve like treatment, so it is only proper that the salutory rules of contract construction applied in *Reuben* also be applied here. By contending that he was promised more funds than he received for less collateral, Austin is attempting to vary the terms of an unambiguous written contract in violation of the parol evidence rule. This he cannot do. The merger clauses contained in his loan agreements expressly prevent him from introducing such proof. Austin must live with the

written bargain he struck in 1983. His free and voluntary execution of those loan documents terminated any viable cause of action for promissory fraud.

Economic Duress and Ratification

Aside from his fraud and oral contract claims, plaintiff further pleads coercion and extreme economic duress as a bar to collection of his $4.7 million debt. This claim is premised on the contention that BVA placed Austin in an untenable position by reneging on its oral promise to lend him "not less than $4.25 million."

Austin allegedly entered into the buy-sell agreement with his sister only because BVA agreed to loan him sufficient funds to pay off Delores, retire certain debts and have operating capital for Diamond. Thereafter, but prior to the May 1983 loan closing, plaintiff learned that defendant would not advance him the amount originally discussed. At the same time, his sister threatened to sue him if he did not consummate their contract for the buy-out of Diamond.

With the Damoclean sword of financial ruin hanging over his head, Austin decided to accept the smaller loan in order to fulfill his contractual obligation and forestall another round of lawsuits with Delores. However, when BVA loaned him only $4 million, Austin contends that Diamond was effectively forced into liquidation, a condition defendant should have foreseen. It is in this scenario that Austin finds duress.

O.C.G.A. § 13-5-6 (Michie 1982) provides:

> Since the free assent of the parties is essential to a valid contract, duress, either by imprisonment, threats,

> or other acts, by which the free will of the party is restrained and his consent induced, renders the contract voidable at the election of the injured party. Legal imprisonment, if not used for illegal purposes, does not constitute duress.

See also Russell v. McCarty, 45 Ga. 197, 198 (1872). This section modified the common law doctrine of duress and must be strictly construed. *Causey v. Matson,* 215 Ga. 306, 310, 110 S.E.2d 356 (1959); *Whitt v. Blount,* 124 Ga. 671, 673, 53 S.E. 205 (1905).

Austin has not claimed that he was wrongfully imprisoned, threatened with violence or subjected to physical duress in the classic sense. Instead, he relies on the doctrine of economic duress, in essence alleging that he was placed in a no-win situation by the independent but concurring acts of BVA and his sister. On a more sinister note, Austin even goes so far as to suggest some evil conspiracy between defendant and Delores to bring about his personal and financial downfall. Suffice it to say, Austin points to no evidence that BVA had anything to gain by throwing good money after bad and pushing Austin and his companies into default.

As to the legal aspects of the duress claim, a brief review of Georgia cases demonstrates that it has no merit. The Court of Appeals succinctly explained economic duress as follows:

> "Business compulsion" or "economic duress" involves the taking of undue or unjust advantage of a person's economic necessity or distress to coerce him into making a contract and is also recognized as a contractual defense. . . . *However, a duress claim of this nature must be based upon acts or conducts of the opposite party which are wrongful or unlawful.*

Charter Medical Management Co. v. Ware Manor, Inc., 159 Ga. App. 379, 381, 283 S.E.2d 330 (1981) (emphasis added). Austin has not—and evidently cannot—point to any wrongful or unlawful acts on BVA's part in procuring the 1983 loan agreements. This alone eviscerates his duress claim.

Moreover, any coercive actions here were taken by Delores, who threatened to sue her brother if he welched on his contract to buy her share of Diamond. Georgia cases hold that a duress defense must be based on the actions of one who is a party to the transaction in question; Delores was not. *See Causey v. Matson, supra,* at 311, 110 S.E.2d 356 (1959); *Charter Medical Management Co. v. Ware Manor, Inc., supra.* Furthermore, "an act must be wrongful to constitute duress, and it is not duress to threaten to do what one has a legal right to do." *Cannon v. Kitchens,* 240 Ga. 239, 240, 240 S.E.2d 78 (1977). Accordingly, a threat to bring a civil action against a person is not duress in the legal sense. *Causey v. Matson, supra,* at 311, 110 S.E.2d 356; *King v. Lewis,* 188 Ga. 594, 598, 4 S.E. 464 (1939); *Bond v. Kidd,* 122 Ga. 812, 813, 50 S.E. 934 (1905).

Even assuming *arguendo* that Austin found himself compelled to agree to an ill-advised contract because of extrinsic circumstances, such a scenario does not provide an automatic escape hatch from an otherwise lawful transaction. In *Tidwell v. Critz,* 248 Ga. 201, 282 S.E.2d 104 (1981), for example, a doctor was forced to accept an unwanted employment contract, rather than a partnership agreement, when a colleague took advantage of his strained financial conditions. Although Critz had flagrantly violated a previous written agreement to form a partnership, he was allowed to enforce the subsequent employment contract. The

court held that the contract was not voidable for duress merely because it was disadvantageous and entered into with reluctance as a result of unequal bargaining power. *Id.* at 204, 282 S.E.2d 104.

The *Tidwell* court also placed great emphasis on the fact that the doctor never rescinded his employment contract, but accepted its terms and retained the benefits flowing therefrom. *Id.* at 205, 282 S.E.2d 104. Here, of course, Austin likewise accepted the loan agreements and retained the proceeds to benefit his businesses. In general, Georgia courts recognized that "accepting and retaining benefits arising from a contract executed under duress after removal of the duress will result in a ratification of the contract." *Id. Accord General Motors Acceptance Corp. v. Bowen Motors, Inc.*, 167 Ga. App. 463, 468, 306 S.E.2d 675 (1983); *Hart v. Trust Company of Columbus*, 154 Ga. App. 329, 330, 268 S.E.2d 384 (1980).

Any duress here was removed on May 12, 1983, when Austin obtained the necessary funds to buy out his sister's share of Diamond. Thereafter, Delores had no cause of action for breach of contract, and Austin had no reason to fear litigation. Nevertheless, plaintiff took no steps to repudiate the loan agreements. Instead, he retained the proceeds and went on to negotiate a total of 13 renewals and extensions of the three promissory notes. In general, renewals cut off all defenses of which the maker then had knowledge. *See Richards v. Southern Finance Corp.*, 171 Ga. App. 268, 269, 319 S.E.2d 103 (1984); *Stevens v. Citizens and Southern National Bank*, 170 Ga. App. 793, 794, 318 S.E.2d 216 (1984); *Motz v. Landmark First National Bank*, 154 Ga. App. 858, 859, 270 S.E.2d 81 (1980). Since

Austin was fully aware of the circumstances surrounding the 1983 loan agreements at the time of the renewals, his subsequent actions must be construed as a waiver of his duress claim and a ratification of the contracts.

The BVA Counterclaim

BVA has counterclaimed for the full amounts due under the three promissory notes, plus attorney fees and collection costs. Austin has admitted that he executed the 1983 loan agreements and that he and his companies are in default under the terms of those agreements.

The only defenses Austin raised in an effort to escape the consequences of default were his claims of fraud, duress and breach of oral contract. This Court, however, has ruled that BVA is entitled to summary judgment on those issues. Since Austin's defenses failed him, it follows that BVA is also entitled to judgment on its counterclaim for the amounts owed on the three notes. Additionally, pursuant to O.C.G.A. § 13-1-11, BVA is entitled to attorney fees of no more than 10% of the judgment. Austin's execution of the 1983 loan agreements renders him personally liable on the $1 million note he signed. He is also liable as a guarantor on the $2.45 million note to Diamond and the $550,000 note to Rose Marine. In sum, plaintiff is indebted to BVA in the principal amount of $4 million, plus accrued interest and 10% attorney fees.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is GRANTED IN PART and DENIED IN PART. As to the prime rate claim, the motion is hereby DENIED.

Finding no merit in the claims of fraud, duress and breach of oral contract, nor any unresolved questions of material fact, the Court GRANTS summary judgment to defendant on its motion as to those issues. Defendant's motion for summary judgment on its counterclaim is hereby GRANTED.

The Clerk of Court is directed to enter judgment in favor of BVA and against Austin in the amount of $4 million, plus interest and 10% attorney fees.

IT IS FURTHER ORDERED that execution of judgment be *stayed* pending resolution of the prime rate claim, as that might affect the amount which Austin must pay in satisfaction of his indebtedness on the three promissory notes.

SO ORDERED, this 2nd day of July, 1986.

/s/ Anthony A. Alaimo
CHIEF JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

DONALD E. AUSTIN	JUDGMENT IN A CIVIL CASE
v.	
BVA CREDIT CORPORATION, a/k/a Bank of Virginia	CASE NUMBER: CV485-373

[ ] *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] *Decision by Court.* This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order of the Court dated July 2, 1986, defendant's motion for summary judgment is granted in part and denied in part. As to the prime rate claim, the motion is denied. The Court grants summary judgment to defendant on its motion as to the claims of fraud, duress and breach of oral contract. Defendant's motion for summary judgment on its counterclaim is granted.

Judgment is hereby entered in favor of BVA CREDIT CORPORATION and against DONALD E. AUSTIN in the amount of $4,000,000 (four million dollars), plus interest and 10% attorney fees.

Date July 3, 1986

Approved:

/s/ Anthony A. Alaimo
Chief Judge, U.S. District Court

/s/ Henry R. Crumley, Jr.
Clerk

/s/ Foster R. Stalery
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DONALD E. AUSTIN,	)	
	)	CIVIL ACTION
Plaintiff,	)	
	)	NO. 485-373
v.	)	
	)	
BVA CREDIT CORPORATION, a/k/a BANK OF VIRGINIA,	)	(Filed July 24, 1986)
	)	
Defendant.	)	

ORDER

Plaintiff has moved for reconsideration of the Court's Order of July 2, 1986, which granted summary judgment in favor of defendant on the issues of fraud and economic duress, as well as breach of oral contract. In support of his motion, plaintiff points to evidence allegedly discovered only recently which purports to lend support to his fraud and duress claims.

Having carefully reviewed the record anew, with particular emphasis on the deposition testimony of attorney Kran Riddle, this Court finds no reason to set aside or modify its prior rulings in any respect. The testimony of Riddle, while somewhat illuminating, in no way alters the effect of the legal principle enunciated in the Order of July 2, 1986. The alleged oral promise remains unenforceable. An unenforceable promise cannot be the basis of a fraud action. Moreover, any evidence of fraud is barred by the merger doctrine and the parol evidence rule. Finally, Austin waived any fraud or duress when he ne-

gotiated multiple renewals of the three promissory notes, thereby ratifying the contracts and accepting their benefits.

In short, plaintiff cannot have his cake and eat it too. For Austin to accept and retain the benefits of the loans, then to plead fraud and duress in an effort to evade his obligation to repay them, violates every cardinal principle of contract law. Furthermore, one who seeks the aid of equity must perform equitably himself. *See* O.C.G.A. § 23-1-10 (Michie 1982). In contract terms, this maxim means that one seeking rescission or cancellation of an instrument must first tender to defendant any amounts admittedly due and owed under the contract in dispute. *See. e.g., Brooks v. Southern Clays, Inc.,* 220 Ga. 152, 137 S.E,2d 630 (1964); *State Mutual Insurance Co. v. Strickland,* 218 Ga. 94, 126 S.E.2d 683 (1962). This Austin has not done. The Court is thus unable to grant equitable relief for fraud.

Austin's legal claims are insufficient under Georgia law, as discussed at length in the Court's Order of July 2, 1986. Accordingly, plaintiff's motion for reconsideration is hereby DENIED.

SO ORDERED, this 24th day of July, 1986.

/s/ Anthony A. Alaimo
CHIEF JUDGE, UNITED
STATES DISTRICT COURT
SOUTHERN DISTRICT
OF GEORGIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

DONALD E. AUSTIN	JUDGMENT IN A CIVIL CASE
v.	
BVA CREDIT CORPORATION a/k/a BANK OF VIRGINIA	CASE NUMBER: CV485-373

[X] *Jury Verdict.* This action came before the Court for a trial jury. The issues have been tried and the jury has rendered its verdict.

[ ] *Decision by Court.* This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the verdict returned by the jury July 29, 1986, JUDGMENT is hereby entered in favor of the defendant, BVA CREDIT CORPORATION a/k/a BANK OF VIRGINIA and against the plaintiff, DONALD E. AUSTIN. Counsel for the parties will enter the amount awarded by stipulation as agreed upon in open court on July 29, 1986.

APPROVED:

/s/ Anthony A. Alaimo
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Date: July 29, 1986

/s/ Henry R. Crumley, Jr.
Clerk

/s/ Robert W. Williams
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

DONALD E. AUSTIN,	)	
	)	CIVIL ACTION
Plaintiff,	)	
	)	NO. CV485-373
vs.	)	
	)	(Filed August
BVA CREDIT CORPORATION,	)	7, 1986)
	)	
Defendant.	)	

AMENDED JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that in accordance with the verdict returned by the jury July 29, 1986, JUDGMENT is hereby entered in favor of the defendant, BVA CREDIT CORPORATION a/k/a BANK OF VIRGINIA and against the plaintiff, DONALD E. AUSTIN in the amount of $5,448,577.83 plus post-judgment interest at the legal rate. This judgment is entered *nunc pro tunc* as of July 29, 1986.

APPROVED:

/s/ Anthony A. Alaimo
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Date: 8-7-86

/s/Henry R. Crumley, Jr.
Clerk

/s/ Buford A. Rowe
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8640

D.C. Docket No. 485-373

DONALD E. AUSTIN,

Plaintiff-Appellant,

versus

BVA CREDIT CORPORATION, a/k/a BANK OF VIRGINIA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

(May 4, 1987)

Before HILL and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See Cir. R. 25.
"Costs taxed against plaintiff-appellant."

Judgment Entered: May 4, 1987

For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: JULY 21, 1987.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8640

DONALD E. AUSTIN,

Plaintiff-Appellant,

versus

BVA CREDIT CORPORATION,
a/k/a BANK OF VIRGINIA,

Defendant-Appellee.

(Filed June 22, 1987)

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 4, 11 Cir., 1987, F.2d)

(June 22, 1987)

Before HILL and KRAVITCH, Circuit Judges and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
UNITED STATES CIRCUIT JUDGE

REHG-6
(6/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DONALD E. AUSTIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	
BVA CREDIT CORPORATION, a/k/a BANK OF VIRGINIA,	)	NO. 485-373
	)	
Defendant.	)	

ORDER

In post-judgment Orders entered on July 2, 3, 24 and 29, 1986, and August 7, 1986, the Court awarded defendant attorney fees as provided under plantiff's promissory note. In calculating the amount of the awards, the Court employed principles of Georgia law.

Upon appeal, plaintiff argued that this Court should have used Virginia law, rather than Georgia law, in calculating the awards. The Court of Appeals, however, rejected plaintiff's arguments and summarily affirmed the judgment of this Court.

Plaintiff now moves for reconsideration of the Court's awards of attorney fees, based upon his continued assertion that the Court erred in applying Georgia law. Plaintiff notes that the Court of Appeals' summary affirmance does not specifically address his arguments on choice of law and urges the Court to reexamine the awards under Virginia law.

Under established principles of law, however, the Court of Appeals' affirmance of the entire judgment is a mandate to this Court which may not be modified or reversed upon motion for reconsideration. *See Coastal Building & Supply Co. v. Int'l Brotherhood of Electrical Workers,* 460 F.2d 105, 107-08 (5th Cir. 1972). In the face of that mandate, the Court is without power to recalculate any award of attorney fees. *See Equitable Life Assurance Society of the United States v. MacGill,* 551 F.2d 978, 84 (5th Cir. 1977).

Accordingly, plaintiff's motion for reconsideration is DENIED.

SO ORDERED, this 21st day of August, 1987.

/s/ Anthony A. Alaimo

CHIEF JUDGE, UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

FILED
OCT 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-468

IN THE

Supreme Court of the United States

October Term, 1987

DONALD E. AUSTIN,

Petitioner,

v.

BVA CREDIT CORPORATION,
a/k/a Bank of Virginia,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT

ROBERT F. BROOKS
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Counsel for Respondent
BVA Credit Corporation

Of Counsel:
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Savannah, Georgia 21498
(912) 233-5722

October 21, 1987

QUESTIONS PRESENTED FOR REVIEW

I. Do questions of state law paralleling issues under review in the Court of Appeals, presented without explanation of their federal significance, merit review on writ of certiorari?

II. Did the Court of Appeals correctly affirm an award of attorneys' fees, reasonable by definition under Georgia law and in compliance with the applicable Georgia statute, when petitioner had waived any objection to the award by not raising the issue until his reply brief on appeal?

III. Did the Court of Appeals properly refuse to remand this case for equitable relief when petitioner had refused to restore or offer to restore the benefits of loans he received from respondent?

IV. Did the Court of Appeals correctly affirm partial summary judgment in favor of respondent when petitioner's issues of fact related only to a theory of recovery rendered immaterial by five independent, legally sufficient grounds for summary judgment relied on by the trial court?

V. Did the Court of Appeals properly deny petitioner a new trial, despite his meritless claim that jury instructions pertaining to the calculation of damages were misleading, when the jury had returned a verdict for respondent on the merits?

The first question should be answered negatively, the others affirmatively, and the petition should be denied.

Parties to the Proceeding
(Rule 28.1)

Respondent BVA Credit Corporation a/k/a Bank of Virginia is a wholly owned subsidiary of Signet Banking Corporation, formerly Bank of Virginia Corporation. BVA Credit Corporation is now known as Signet Commercial Credit Corporation. Signet Banking Corporation is also the holding company of related companies listed at Appendix 1.

General Finance Service Corporation is a subsidiary of Signet Commercial Credit Corporation, but has sold its assets to Security Pacific Corporation. Budget Plan Company of Virginia is a subsidiary of General Finance Service Corporation.

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I. OPINIONS AND JUDGMENTS BELOW

This litigation results from the financial failure of two companies, the owner of which had borrowed money in an unsuccessful effort to sustain them. Disgruntled, he sued his banker, saying he was overcharged interest and otherwise defrauded.

The United States District Court for the Southern District of Georgia (the trial court) granted partial summary judgment in favor of BVA Credit Corporation (BVA), the banker. Austin's Motion for Reconsideration of that judgment was denied. Jury trial on Austin's remaining allegations resulted in a verdict in favor of BVA. The trial court entered judgment on that verdict, and Austin appealed to the United States Court of Appeals for the Eleventh Circuit. The appellate court affirmed the trial court's rulings in all respects. The same court denied Austin's Petition for Rehearing and Suggestion for Rehearing En Banc (copies of these orders, judgments, and the jury verdict were attached as Petitioner's Appendix 1-22).

Austin then filed a Motion for Relief from Judgment in the trial court. The trial court denied the Motion. (Its order was attached at Petitioner's Appendix 23.) On September 11, 1987, Austin filed a Notice of Appeal from this order to the Eleventh Circuit. (This Notice is attached at Respondent's Appendix 3.) That appeal is pending. Ten days later, Austin petitioned this Court for writ of certiorari to the Eleventh Circuit's first order.

II. JURISDICTION

The parties are in agreement as to jurisdiction.

III. STATUTES INVOLVED

The Georgia attorneys' fee statute states:

> If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percent, such provision shall be construed to mean 15 percent of the first $500.00 of principal and interest owing on such note or other evidence of indebtedness, and 10 percent of the amount of principal and interest owing thereon in excess of $500.00.

O.C.G.A. §13-1-11(a)(2).

Austin's claim for equitable relief involves another Georgia statute, which provides:

> A contract may be rescinded at the instance of the party defrauded; but, in order to rescind, the defrauded party must promptly, upon discovery of the fraud, restore to the other party whatever he has received by virtue of the contract if it is of any value.

O.C.G.A. §13-4-60.

IV. STATEMENT OF THE CASE

Although Austin included a copy of the pertinent order in his Appendix, it should be mentioned that the Court of Appeals for the Eleventh Circuit denied his Petition for Rehearing En Banc. In addition, Austin filed a Motion for Relief from Judgment in the trial court, raising an issue disposed of by the Eleventh Circuit: whether the trial court's award of attorneys' fees pursuant to O.C.G.A. §13-1-11 was erroneous. The trial court properly denied the motion on the ground the Court of Appeals' affirmance of the entire judgment was a man-

date that could not be modified or revised upon a motion for reconsideration. (See Order dated August 21, 1987, attached at Petitioner's Appendix 24.) Austin appealed yet again to the Court of Appeals on September 11, 1987. (See Notice of Appeal, Respondent's Appendix 3.) That appeal is pending.

A. The Loans

Austin secured a $1,500,000 revolving credit loan for Diamond Manufacturing Company (Diamond) from BVA on March 14, 1978. On May 12, 1983, BVA set Diamond's credit at $2,450,000 and lent $550,000 to Rose Marine, Inc. (Rose), and $1,000,000 to Austin personally. Austin guaranteed the loans to Diamond and Rose. These transactions were reflected in fully integrated written loan agreements and guaranties. (R1-5-2 through 4, R2-7-2 through 4)[1] Austin and his companies made interest payments only in 1983, made sporadic interest payments in 1984, and altogether ceased payments in 1985. (R9-76 through 77) In July, 1985, BVA notified Austin that the loans were in default. Austin filed this action and then placed himself and his companies in bankruptcy. (R6-61-4) BVA counterclaimed for the amounts due under the loans. (R1-5)

Austin's Complaint consisted of two factually distinct claims for relief: (1) BVA charged Diamond excessive interest, and (2) BVA breached an oral promise to lend more money to Austin. The trial on the first claim resulted in a jury verdict for BVA. The second claim was disposed of by the trial court's summary judgment ruling in favor of BVA.

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[1]References are to the record on appeal.

B. The Trial

The claim Austin ultimately took to the jury was that BVA overcharged interest by not computing it according to the terms of the March 14, 1978 original loan agreement. Specifically, Austin argued, BVA breached a provision that Diamond would be charged interest at a rate equal to "three and three-quarters percent over the best...interest rate charged from time to time by Bank of Virginia...to its largest and most creditworthy commercial customers for new unsecured 90-day loans" (the "best rate")[2] by calculating interest based on the prime rate rather than this "best rate."[3] (R9-11 through 13)

As it turned out, BVA used Bank of Virginia's prime rate to calculate the interest charged Diamond because, to the Bank of Virginia, "best rate" and prime rate were synonymous, a fact borne out by the testimony of all four of BVA's witnesses at trial. (R9-77, 78, 191, 206, 217) Although BVA's Roy Brown had a personal dislike for the term "best rate," he recognized that the terms were synonymous. (R-96-106) Indeed, contrary to Austin's assertions, the evidence at the trial demonstrated "best rate" was the definition of prime rate. (R9-190)

Austin also argued at trial and on appeal that he was defrauded because he would not have dealt with BVA had he known that "best rate" and prime rate were

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[2]In early 1981, Bank of Virginia and BVA notified their customers that the interest to be charged in the future would not be based on the "best rate," but would be determined from the "announced prime rate." (R9-188) Austin accepted the change on March 10, 1981. (R9-40 through 43) Thus, the alleged interest overcharge was limited to the three-year period from March 14, 1978 to March 10, 1981.

[3]Originally, Austin claimed BVA favored certain customers with a lower interest rate than its "best rate." When discovery yielded no evidence that BVA had done so, Austin fastened on BVA's interchangeable use of "best rate" and prime rate as the basis for his allegations of fraud.

synonymous. Presumably Austin took that position because he discovered no loans in which BVA charged an interest rate below its "best rate," as he originally charged, nor any difference between best and prime rate, as he later charged. In any event, that position was undermined when Austin admitted he considered the terms synonymous and used them interchangeably in his own business dealings. (R9-152, 166 through 172)

Although the trial court recognized the paucity of Austin's evidence (R-9-254), the "best rate" claim was submitted to the jury, which returned a verdict for BVA. (R9-277, 278)

C. Summary Judgment

In the early 1980's, escalating disputes between Austin and his sister, Dolores Diamond, threatened the economic viability of Diamond. (R3-30, Exhibits 5-8) Austin alleged that to resolve the disputes, BVA made an oral promise to him in late 1982 to lend him enough money at no additional collateral so that he could purchase his sister's ownership interest in Diamond, pay off trade creditors, and provide operating capital for the company. (R1-1-2) In reliance on this amorphous promise, he agreed to buy his sister's interest in Diamond. Austin further contended BVA conspired with his sister to breach this oral contract and to subject him to economic duress in order to force his acceptance of the written loan agreements.

These allegations stated deficient claims as a matter of law and, thus, the trial court, by Order dated July 2, 1986, granted BVA partial summary judgment. (R6-61)[4] The court based its ruling on five separate and independent legal grounds:

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[4]The trial court, by Order dated July 24, 1986, denied Austin's Motion for Reconsideration. (R6-68)

1. the alleged oral promise was unenforceable under Georgia law because no amount, interest rate, or term was specified;
2. the alleged oral promise was merged into the subsequent written agreements of May 12, 1983;
3. the parol evidence rule barred evidence of the alleged oral promise;
4. Austin's economic duress and conspiracy allegations, even if true, did not constitute legal duress; and
5. Austin ratified the May 12, 1983 loan agreements and waived any claims of fraud and duress by retaining the proceeds, making interest payments, and executing thirteen separate renewals and extensions of the loans.

These inescapable legal conclusions were supported by dispositive, yet undisputed, facts:

First, though Austin alleged BVA breached its oral promise because it did not lend him enough money and required additional collateral, he admitted that BVA "never made a commitment" to lend him a specific amount of money. (R-3-30, Exhibit 19; see also R3-30, Exhibit 9) In addition, there was no evidence Austin and BVA ever agreed on the duration of the alleged loan or the interest rate. Equally important, Austin testified he knew before closing the transaction precisely how much BVA intended to lend him—an amount less than he later claimed was offered. Indeed, at the loan closing, Austin asked for, but was denied, the additional funds allegedly promised. (R3-30, Exhibit 9) Finally, Austin admitted he knew of and specificially agreed to BVA's collateral requirements. (R3-30, Exhibits 13 and 14)

What is more, Austin executed the loan agreements with full knowledge of their contents. Those documents were integrated instruments which specified that they contained the entire agreement between the parties. (R1-5, Exhibits E §11.2, G §13.2, J and A §13.2) Austin doubtlessly understood what he was signing when he executed the loan agreements and accepted the proceeds of the loans. (R3-30, Exhibit 15)

After he signed the agreements, Austin made interest payments and executed additional documents ratifying the transaction. That is, he personally executed a series of extensions and renewals of his personal loan and signed off on extensions and renewals of Diamond's and Rose's loans on thirteen separate occasions.[5]

For these reasons, the trial court granted partial summary judgment. At the same time, the trial court awarded to BVA attorneys' fees equal to 10% of Austin's principal indebtedness and interest as required by Georgia law. Despite nine opportunities to protest either the amount of the fees or the trial court's application of the Georgia statute, Austin remained silent until he filed his reply brief in the first appeal.

V. SUMMARY OF ARGUMENT

First, the writ should be denied simply because Austin has failed to state why it should be granted, a telling departure from the requirements of Rules 21.1(j) and 17 of the Rules of the United States Supreme Court. More than that, Austin's petition presents questions of state

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[5]Austin renewed his $1,000,000 note on October 23, 1984, February 6, 1985, and April 30, 1985. Diamond renewed its $2,450,000 note on June 26, 1984, July 30, 1984, October 23, 1984, February 6, 1985, and April 30, 1985. Rose renewed its $550,000 note on June 26, 1984, July 30, 1984, October 23, 1984, February 6, 1985, and April 30, 1985. (R3-30, Exhibit 17, Nos. 4, 7, 10, 13, 16, 22, 25, 28, 34, 37, 40, 43, and 46)

law only and involves no issue of federal significance. Worse, the case is pending on appeal, and in disregard of Rule 18, Austin has failed to identify any issue of such imperative public importance to justify deviation from normal appellate practice.

Second, the writ should be denied because the questions Austin presents lack merit. Austin's assertion that the attorneys' fees award was improper is refuted simply by reference to the statute under which the trial court awarded interest. The loan agreements provided for reasonable attorneys' fees, but did not specify a percentage. O.C.G.A. §13-1-11(a)(2) provides that if a percentage is not specified, a provision for reasonable attorneys' fee shall be construed to mean 10% of the principal and interest due. That is precisely what the trial court awarded. In any event, Austin waived any right to protest the award by failing to raise the issue until he filed his reply brief on appeal in the Eleventh Circuit.

Austin's claim that he was entitled to equitable relief is contrary to familiar equitable principles and Georgia statute O.C.G.A. §13-460. Both require a defrauded party (which, as the jury determined, Austin was not) to restore the benefits of a contract before he can rescind it. This Austin did not do.

Austin's jeremiad that his theories of conspiracy and economic duress presented issues of fact suffers from three fundamental defects. Austin says BVA's breach of an oral contract resulted in economic duress which forced him to execute the loan agreements of May 12, 1983. But Austin's alleged oral contract was (a) void for vagueness, and (b) unenforceable under both the merger doctrine and the parol evidence rule. Second, economic duress is not legal duress in Georgia. Third, Austin ratified the written loan agreements and waived duress. Both ratification and waiver were shown conclusively by

Austin's admissions that he retained and spent the loan proceeds, made interest payments on the loans, and executed renewals and extensions of the loans, all with knowledge of the relevant facts.

Consideration of Austin's objection to the damages charge is unnecessary inasmuch as the jury returned a verdict in favor of BVA. The instructions stated Georgia law, so the issue is entirely one of state law.

VI. ARGUMENT

A. Austin's Petition Presents No Federal Issues Important Enough To Warrant Review.

1. Austin Presents Only Questions Of State Law And Has Not Explained The Reasons The Petition Should Be Granted.

The crucible for any petition for writ of certiorari is whether the case is of such overwhelming federal significance that this Court should grant review. Resolution of that issue is guided generally by the standards set forth in Rules 17 and 18 of the Rules of the Supreme Court of the United States. Rule 21.1(j) requires Austin to amplify the reasons why the writ should be allowed, referring specifically to Rule 17. Austin denies Rule 17 even lip service. This is not surprising because the questions Austin presents for review are questions of Georgia law, containing nothing of significant federal interest.

First, in Question 1, Austin disputes the application by the Eleventh Circuit of its own local rules governing affirmances without opinion and questions that court's review of the trial court's choice of law in a diversity case. Obviously, an appellate court's interpretation of its own rule does not conflict with the decision of any other court of appeals. Nor is there any conflict with a federal

rule or statute, whereby an important question of federal law might arise. Just as clearly, the Court of Appeals' affirmance of the trial court's application of Georgia choice of law principles raises no question of federal law.

Austin's Question 2 requests review of the Court of Appeals' affirmance of the trial court's decision that Austin was not entitled to equitable remedies under Georgia law. This is not an issue of federal law. Austin does not, and cannot, point to any radical departure from the usual course of judicial proceedings.

In Question 3, Austin challenges the affirmance by the Court of Appeals of summary judgment against Austin. Question 4 addresses an alleged conflict in jury instructions. Again, resolution of these issues conflicts with no decision of another court of appeals and presents no important question of federal law.

In summary, Austin's petition raises no substantial issue of federal law. He alleges no radical departure from acceptable procedures by the courts below, and he suggests no conflict with another circuit. Indeed, notwithstanding Rule 21.1(j)'s requirements, Austin has not even hinted at the reasons why these issues merit review. Therefore this Court should deny Austin's Petition for Writ of Certiorari.

2. This Case Is Still On Appeal, And No Imperative Public Importance Justifies Deviation From Normal Appellate Procedure.

BVA sets forth in its statement of the case what Austin neglects to state in his: the attorneys' fees issue is again on appeal to the Court of Appeals.[6] Before this Court should consider an issue not finally resolved below, Austin must demonstrate the issue is of such imperative public importance as to justify both deviation from normal appellate practice and immediate settlement by this Court. *See* Rule 18 of the Rules of the United States Supreme Court.

Notwithstanding Rules 18 or 21.1(j), Austin has made no effort whatsoever to establish the imperative public importance of this case. Neither has he suggested how immediate resolution will benefit himself, the federal system, or the general public. In sum, the attorneys' fees issue is not finally resolved on appeal, and in any event the issue concerns Georgia law, or the application of an Eleventh Circuit administrative local rule. Consequently, question 1 does not require, nor even merit, immediate resolution in this Court. *See, e.g., Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

B. AUSTIN'S FAILURE TO DISPUTE THE TRIAL COURT'S PROPER CALCULATION OF DAMAGES CONSTITUTED WAIVER.

In his first appeal to the Eleventh Circuit, Austin claimed in opening brief that because the loan agree-

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[6]BVA believes Austin's latest appeal is frivolous. Nonetheless, the issues in that appeal and in Question 1 are intimately related or even identical, and until the Court of Appeals has finally disposed of the matter, a petition for writ of certiorari is premature and should be denied.

ments provided for reasonable attorneys' fees, Georgia law, specifically O.C.G.A. §13-1-11, required evidence of the reasonableness of the fees. Then, in his reply brief, Austin took a new position. He said the trial court erroneously awarded attorneys' fees equal to ten percent of the unpaid principal and interest owed BVA because Virginia law governed and required evidence of the reasonableness of the fees.[7] Yet O.C.G.A. §13-1-11 (a)(2), which the trial court applied, does not require evidence of reasonableness. It says:

> If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percent, such provision shall be construed to mean 15 percent of the first $500.00 of principal and interest owing on such note or other evidence of indebtedness, and 10 percent of the amount of principal and interest owing thereon in excess of $500.00.

Here, the loan documents did not specify a percentage. O.C.G.A. §13-1-11 required the trial court to construe reasonable attorneys' fees to be ten percent of the

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[7]In an effort to federalize the state law issue presented in Question 1 Austin claims the Court of Appeals' affirmance without opinion of the trial court's award of attorneys' fees to BVA violates Eleventh Circuit Local Rule 36-1. That rule permits the Court of Appeals to affirm without opinion, when an opinion would have no precedential value, in five circumstances. Nowhere does Austin discuss the effect of a violation of this rule, though Austin claims he was prejudiced by its violation. Beyond that, Austin does not explain his failure to raise this issue to the Court of Appeals when he petitioned for rehearing or rehearing en banc. Austin thus denied the Eleventh Circuit, the court best situated to correct any violation of Local Rule 36.1, an opportunity to do so. Given this posture of the case, this Court should not review the Court of Appeals' application of its own rule.

judgment.[8] Accordingly, "it was not error for the court to award attorney fees in the absence of proof of the value of the attorney's services." *Roddy Sturdivant Enters., Inc.* v. *National Advertising Co.*, 145 Ga. App. 706, 244 S.E.2d 648, 649 (1978).

In any event, Austin waived the claim that Virginia law applies. Austin said nothing to indicate he thought Virginia law applied on at least nine earlier occasions when attorneys' fees were at issue:

1. In his interrogatory answer to Southern District of Georgia Local Rule 8.6, requiring plaintiff to identify the applicable law, Austin stated that Georgia common law applied to his breach of contract claim; nowhere did he mention Virginia law (R1-1-1);

2. In BVA's Motion for Summary Judgment on its counterclaim against Austin, BVA appended exhibits embodying its demand for ten percent attorneys' fees under O.C.G.A. §13-1-11; yet in response Austin did not challenge the applicability of the Georgia statute or mention Virginia law (R3-30, 42; R4-48);

3. To supplement his brief in opposition to BVA's Motion for Summary Judgment, Austin filed an extra memorandum in response to BVA's rebuttal memorandum in support of BVA's motion; Austin failed to challenge the applicability of Georgia law or even mention BVA's request for attorneys' fees (R6-54);

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[8]Although BVA was entitled to an additional 5% on the first $500 of debt, BVA waived the additional $25.

4. At the oral argument of BVA's Motion for Summary Judgment, Austin did not oppose, or even comment about, the applicability of the Georgia statute;

5. When the trial court indicated in pre-trial conference that BVA was entitled to ten percent attorneys' fees, Austin offered no opposition (R8-7);

6. Austin stipulated to the inclusion in a pre-trial order of a sentence stating that BVA had notified Austin and his affiliated companies of BVA's intention to collect ten percent attorneys' fees under O.C.G.A. §13-1-11 (R6-63);

7. In his motion and memorandum for reconsideration of the trial court's grant to BVA of partial summary judgment, Austin challenged neither the applicability of the Georgia statute nor the grant of attorneys' fees, and he said nothing of Virginia law (R6-65);

8. Austin presented, along with BVA, an amended judgment order to the trial court; that order set a judgment amount that included ten percent attorneys' fees (R6-71);

9. Finally, on appeal from that judgment, Austin challenged for the first time the award of attorneys' fees; yet he still did not contend that Virginia law applied.

Not until his reply brief did Austin raise the claim that Virginia law applied. "Arguments raised for the first time in a reply brief are not properly before the reviewing court." *United States* v. *Oakley*, 744 F.2d 1553, 1556 (11th Cir. 1984); *United States* v. *Benz*, 740 F.2d 903, 916

(11th Cir. 1984), *cert. denied* 474 U.S. 817 (1985). Because Austin did not preserve this argument, he waived it. Therefore this Court need not, and should not, review the matter further.

C. Austin Was Not Entitled To Equitable Relief Because He Refused To Perform Equitably.

Austin's plea to the offices of equity was rejected by the trial court because Austin neither restored nor offered to restore the benefits of the loan agreements:

> [O]ne who seeks the aid of equity must perform equitably himself. *See* O.C.G.A. §23-1-10 (Michie 1982). In contract terms, this maxim means that one seeking rescission or cancellation of an instrument must first tender to defendant any amounts admittedly due and owed under the contract in dispute. *See, e.g., Brooks* v. *Southern Clays, Inc., 220 Ga. 152, 137 S.E.2d 630 (1964); State Mutual Insurance Co. v. Strickland, 218 Ga. 94, 126 S.E.2d 683 (1962).* This Austin has not done.

R6-68-2.

The Georgia statute (O.C.G.A. §13-4-60) expressly provides that a party seeking to rescind a contract for fraud must restore the status quo and pay for the value of the benefits of the contract. Thus, to perfect his claim for equitable relief, Austin first had to repay the benefits he received from the loans. *Roberts* v. *Southern Ry.*, 73 Ga. App. 759, 38 S.E.2d 48 (1946). Here those benefits were not only principal but also interest due BVA. *Redwine* v. *Frizzell*, 184 Ga. 230, 190 S.E. 789, 793-794 (1937) ("[B]efore a borrower who has executed a deed to secure a debt can have affirmative equitable relief . . . such debtor must pay or tender the creditor the

principal and interest due"). Stated simply Austin wants BVA to provide unrequited benefits, an approach that defeats his claim for rescission. *Wheeler* v. *Pioneer Invs., Inc.*, 217 Ga. 367, 122 S.E.2d 518 (1961).

Austin's plea for more time to liquidate his assets was irrelevant at the time because liquidation was (and still is) being controlled by the Bankruptcy Court. (R7-50, 51) Moreover, Austin's actions belied his excuse that he could not satisfy the loans. He had previously refused to do what he claimed below he would like to do. In the years following the May 12, 1983 loan agreements, Austin refused to sell sufficient assets to make even the interest payments that were due despite the fact that "BVA granted Austin extension after extension to give him time to sell his assets and place Diamond in a profit-making position." (R6-61-4) (See R3-30, Exhibit 23) Similarly, Austin once agreed to sell Rockingham Farms to reduce his indebtedness to BVA, but instead he breached that agreement and engaged in litigation with his sister.[9] Thus, Austin's plea to be allowed to prepay principal through a reasonable liquidation of assets c years too late. (R6-66, Exhibits B and C) Despite pleas, Austin offered no satisfactory reason why some of his assets were not sold to repay, in whole or in part, his indebtedness. Against that background, the trial court properly refused to grant Austin the benefit of any equitable relief.

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[9]In connection with the purchase of his sister's interest and the execution of the loan agreements, Austin agreed to sell Rockingham Farms and apply his portion of the proceeds to reduce his indebtedness to BVA. See Trial Exhibit DX-32; R3-30, Exhibit 13, pp. 117-118; R3-30, Exhibit 14, R6-66, Exhibit C.

D. Austin's Issues Of Fact Relate Only To A Theory Of Recovery Rendered Immaterial By The Trial Court's Five Independent, Legally Sufficient Grounds For Granting BVA Partial Summary Judgment.

This Court has emphasized in recent decisions that summary judgment should be granted pursuant to Rule 56 of Federal Rules of Civil Procedure, when there is "no genuine issue of material fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986). BVA was entitled to partial summary judgment notwithstanding Austin's allegations of conspiracy and duress because it made proper showings of the lack of genuine, triable issues of material fact. That is, allegations of conspiracy and duress were immaterial because, even if true, they did not constitute legal duress in Georgia. Furthermore, facts material to the trial court's four other independent bases for granting partial summary judgment were freely admitted by Austin. In short, the disputed facts were immaterial and the material facts were undisputed.

1. Austin Does Not Address The First Three Legally Sufficient and Independent Bases For The Trial Court's Ruling.

Austin's duress and conspiracy allegations were bottomed on his claim that BVA breached an oral promise. Austin alleged that because the disputes with his sister endangered Diamond's existence, BVA orally promised to lend him sufficient funds to purchase his sister's interest in Diamond, pay off trade creditors, and provide Diamond operating capital. In reliance on the purported promise, Austin said, he agreed to purchase his sister's interest in Diamond. Austin further asserted that BVA conspired with his sister to cause him economic duress

which compelled him to accept terms less attractive than those orally promised.

The *sine qua non* for such claims is an enforceable oral contract. That, Austin did not have. Rather, Austin admitted his oral contract did not specify an amount, interest rate, or term, and that he subsequently executed written loan agreements on May 12, 1983, knowing the terms were not what he had been promised. These admissions mandated the trial court's decision that Austin had no cause of action based on the purported oral contract. *Dolanson Co.* v. *Citizens & S. Nat'l Bank*, 242 Ga. 681, 251 S.E.2d 274, 276 (1978); *Bonner* v. *Wachovia Mortgage Co.*, 142 Ga. App. 748, 236 S.E.2d 877, 879 (1977).

Moreover, Austin's contract claim was barred by the doctrine of merger and the parol evidence rule because Austin understood the terms of the May 12, 1983 loan agreements when he executed them. (R6-61-7) *Accord Adams* v. *North Am. Business Brokers, Inc.*, 168 Ga. App. 341, 309 S.E.2d 164 (1983); O.C.G.A. §13-2-2(1). (*See also* R3-30-22 through 30)

The trial court properly applied the same reasons to Austin's fraud count.

> The promissory fraud claim must fail for the same reasons. First a cause of action for fraud cannot be predicated on a promise which is unenforceable at the time it was made. *Clare Development Corp.* v. *First National Bank of Columbus*, 243 Ga. 709, 256 S.E.2d 452 (1979); *Sierra Associates* v. *Continental Illinois National Bank & Trust Co.*, 196 Ga. App. 784, 792, 314 S.E.2d 250 (1984). Since an oral promise to make a loan without any specification of principal, interest and duration is unenforceable, it

> cannot support an action for promissory fraud. *Beasley* v. *Ponder*, [143 Ga. App. 810, 240 S.E.2d 111 (1970)], *supra*, at 810, 240 S.E.2d 111; *Bonner* v. *Wachovia Mortgage Co.*, *supra*, at 750, 236 S.E.2d 877.
>
> Austin's promissory fraud claim is likewise barred by the parol evidence rule and the merger doctrine. *See, e.g., Reuben* v. *First National Bank of Atlanta*, 146 Ga. App. 864, 247 S.E.2d 504 (1978).

(R6-61-7 through 8) Unable to confront the trial court's first three bases for granting BVA partial summary judgment, Austin understandably has ignored them at every stage of the litigation since BVA filed its Motion for Summary Judgment.

2. Austin Was Under No Legal Duress When He Executed the Loan Agreements.

In Georgia, economic duress is not legal duress. *Ryder Truck Lines, Inc.* v. *Goren Equip. Co.*, 576 F. Supp. 1348, 1355 (N.D. Ga. 1983) ("[E]conomic pressure is insufficient to constitute duress in the legal sense"). The *Ryder* court based its holding that "one may not void a contract on the grounds of economic duress" on the "clear holding" of the Georgia Supreme Court in *Tidwell* v. *Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981).

Here, the trial court also relied on *Tidwell* in finding Austin's duress allegations immaterial and insufficient:

> Even assuming *arguendo* that Austin found himself compelled to agree to an ill-advised contract because of extrinsic circumstances, such a scenario does not provide an automatic escape hatch from an otherwise lawful transaction.

(R6-61-11, 12) *See also Woods* v. *Wright*, 163 Ga. App. 124, 292 S.E.2d 545 (1982). As the trial court aptly stated, "[f]or Austin to accept and retain the benefits of the loans, then to plead fraud and duress in an effort to evade his obligation to repay them, violates every cardinal principle of contract law." (R6-68-2)

3. Austin Ratified the Loan Agreements And Waived Any Claims of Fraud and Duress

Although Austin suffered no legal duress, any economic duress he might have felt was removed when he received the loan proceeds. By retaining the proceeds and spending the money to benefit his businesses, Austin ratified the loan agreements and waived any claims of fraud and duress. (R6-61-12) *Tidwell* v. *Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981); *General Motors Acceptance Corp.* v. *Bowen Motors, Inc.*, 167 Ga. App. 463, 306 S.E.2d 675, 680 (1983).

Furthermore, after Austin knew the loans differed from the alleged oral promise, he made interest payments on the loans and executed thirteen extensions and renewals of the loans. In short, "[s]ince Austin was fully aware of the circumstances surrounding the 1983 loan agreements at the time of the renewals, his subsequent actions must be construed as a waiver of his duress claim and a ratification of the contracts." (R6-61-13) *Accord Motz* v. *Landmark First Nat'l Bank of Fort Lauderdale*, 154 Ga. App. 858, 270 S.E.2d 81, 83 (1980).

Predictably, Austin sought to avoid his waiver by arguing that principles of waiver, estoppel, and ratification were irrelevant because BVA perpetrated a fraud which concerned the interest rates that it charged its customers. Austin's argument was groundless because (1) the jury found there was no fraud, and (2) Austin admitted he knew the facts relevant to his claims of fraud

and duress claims when he made interest payments and executed renewals and extensions of the May 12, 1983 loan agreements.

E. Austin's Objection To His Own Jury Charge On Damages Is Not A Proper Challenge To The Proceedings Below, Is Moot, And Lacks Merit.

Since the jury found for BVA, Austin's objection to the trial court's damages charge need not be reviewed.

> When a verdict has been returned in favor of the defendant on liability, errors in the giving of a charge, failure to charge, or denial of requests to charge which go only to the matters of damages or the measure of damages are harmless and afford no ground for reversal. See *Maloy* v. *Dixon*, 127 Ga. App. 151, 152 (Hn. 2), 193 S.E.2d 19. These enumerations are without merit.

Big Bend Agri-Services, Inc. v. *Bank of Meigs*, 174 Ga. App. 493, 330 S.E.2d 422, 426 (1985). *See also Morgan* v. *Citizens & S. Nat'l Bank*, 165 Ga. App. 254, 299 S.E.2d 750, 752 (1983). *Accord National Distillers and Chem. Corp.* v. *Brad's Mach. Prods., Inc.*, 666 F.2d 492, n.3 (11th Cir. 1982). *See* 5A C.J.S. *Appeal & Error* §1773(2), n.74 (1958).

Although the argument is moot, there was no error because the charge did not mislead the jury. *National Distillers*, 666 F.2d at 497. The trial court specifically charged the jury concerning Austin's claim that he was defrauded in that he did not know that "best rate" and prime rate were the same. (R9-266, 267) The trial court went on to explain BVA's position that the terms were synonymous. (R9-268) As a matter of fact, except for the paragraph setting out BVA's position (R9-268) and BVA's one-page damage instruction (R9-271, 272), the

charge was taken verbatim from Austin's requested charge. Since the trial court gave Austin's requested charge and fully explained Austin's contentions before giving BVA's damage instructions, the charge was not erroneous. *See Smith* v. *Borg-Warner Corp.*, 626 F.2d 384, 387-388 (5th Cir. 1980).

In addition, the evidence presented at trial and the arguments of counsel show that the jury was not misled. BVA's counsel devoted his entire cross-examination of Austin to establishing that Austin knew "best rate" and prime rate were synonymous. (R9-160 through 177) Every witness for BVA testified the terms were synonymous. Indeed, except for Diamond's comptroller, who testified as to Austin's damages, every witness testified about the difference, or lack thereof, between best and prime rate, and counsel repeatedly argued the issue. (R9-12, 13, 15, 228, 230, 232, 246; R9-25, 26, 233 through 240, 243) For Austin to assert the jury did not know it was to decide if "best rate" and prime rate were synonymous is extraordinary when that was the primary issue at trial.

Viewed in light of the evidence and arguments of counsel, the entire charge does not raise a "substantial or ineradicable doubt as to whether the jury was properly guided in its deliberations." Accordingly, there was no error. *National Indep. Theatre Exhibitors, Inc.* v. *Charter Fin. Group, Inc.*, 747 F.2d 1396, 1403 (11th Cir. 1984), *cert. denied*, 471 U.S. 1056 (1985). *See also Dwoskin* v. *Rollins, Inc.*, 634 F.2d 285, 294 (5th Cir. 1981).

VII. CONCLUSION

Austin has not given any reason the writ should be granted. Though the attorneys' fees award was proper, Austin waived any challenge to the award by his failure to raise the claim before his reply brief on appeal. Austin was not entitled to equitable remedies because he failed to perform equitably. BVA was entitled to partial summary judgment because Austin's claims were legally deficient. Finally, Austin's objection to the jury charges is meritless and moot since the jury verdict was in favor of BVA. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix

In addition to *Signet Commercial Credit Corporation* referred to at page ii of this Brief, **SIGNET BANKING CORPORATION** has thirteen other wholly-owned subsidiaries as follows:

1. *Signet Bank/Virginia* has as direct subsidiaries **Signet Bank International** (which owns and controls **Signet Bank (Bahamas), Ltd.,** which has as a direct subsidiary **Second Eleutheran Investment Co., Ltd.**), **800 Building Corporation, Signet Mortgage Corporation,** and **Signet Second Mortgage Corporation,** (which has as a direct subsidiary **Peninsula Development Corporation**);

2. *Signet Trust Company*

3. *Elgin Corporation*

4. *Signet Properties Company*

5. *Signet Insurance Services, Inc.*

6. *Signet Investment Banking Company*

7. *Signet Investment Corporation*

8. *Landmark Financial Services, Inc.*, has as direct subsidiaries **Atlantic-Phoenix Life Insurance Co., Landmark Mortgage Corp. of MD, Landmark Financial Services of MD, Inc., Landmark Financial Services of WV, Inc., Landmark Financial Services of NC, Inc.** (which owns the assets of **Southeastern Finance Corp. of Dunn, NC**), **Landmark Financial Services of SC, Inc., Landmark Financial Services of TN, Inc., Landmark Financial Services of GA, Inc., Landmark Financial Services of FL, Inc., Landmark Financial Services of AL, Inc., Landmark Financial Services of MS, Inc.,** (which owns the assets of **Dacor Finance, Inc.**), **Landmark Mortgage Corporation, Landmark Mortgage Corp. of VA,** and **Landmark Equity Corp. of FL.**

9. *Signet Bank/Maryland* has as direct subsidiaries **Signet Equipment Company, Wharton & Bennett, Inc., St. Paul Realty, Inc., Sect. 12-A Corp., Sect. 12-B Corp., Sect. 13 Corp., Sect. 14 Corp., UTC Prop. No. 1, Inc., UTC Prop. No. 2, Inc., UTC Prop. No. 3, Inc., UTC Prop. No. 4, Inc., UTC Prop. No. 5, Inc., UTC Prop. No. 6, Inc., Landexco, Inc., Mystic Harbour Corp., MH Utilities Corp.** (the last thirteen subsidiaries are corporations holding real and personal property acquired by foreclosure), **Signet Home Loan Corporation** (which owns all the outstanding stock of **Signet Home Loan Corporation/ South Carolina, Signet Home Loan Corporation/Virginia, Signet Home Loan Corporation/North Carolina** and **Signet Home Loan Corporation/Pennsylvania**), **Signet Leasing and Financial Corporation,** and **Preferred Brokerage Service, Inc.**

10. *Signet Realty, Inc.*

11. *Signet Insurance Services, Inc./Maryland*

12. *Signet Bank N.A.*

13. *Signet Bank (Grand Cayman), Ltd.*

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

DONALD E. AUSTIN,
Plaintiff,

vs.

BVA CREDIT CORPORATION, a/k/a BANK OF VIRGINIA,
Defendant.

CIVIL ACTION NO. CV485-373

(Filed 9/11/86)

NOTICE OF APPEAL

Notice is hereby given that DONALD E. AUSTIN, Plaintiff in the above referenced matter, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order entered in the above-captioned action on August 21, 1987.

THIS 11th day of SEPTEMBER, 1987.

BOUHAN, WILLIAMS & LEVY

/s/ Walter C. Hartridge

/s/ M. Tyus Butler, Jr.

/s/ Roy E. Paul

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